19-526 Mar 10, 74 Judge Davis

Judge Hunt Dissents

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~442~~ 225

BOLIVAR S. HEAD, PLAINTIFF IN ERROR,

vs.

THE CURATORS OF THE UNIVERSITY OF THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 28, 1872.

Oct Jan 1873

SUPREME COURT OF THE UNITED STATES.

No. 442.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the January term, 1871, of said court, between Bolivar S. Head, plaintiff, and The Curators of the University of the State of Missouri, defendant, a manifest error hath happened, to the great damage of the said Bolivar S. Head, plaintiff aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this eighteenth day of January, in the year of our Lord one thousand eight hundred and seventy-one.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

DAVID WAGNER,
Presiding Judge Sup. C't Mo.

2 STATE OF MISSOURI, *ss:*

I, N. C. Burch, clerk of the supreme court of the State aforesaid, herewith return the within writ, with the transcript of the record and proceedings of said court in said cause hereto attached.

Witness my hand and the seal of said court hereto affixed at office in the city of Jefferson, this 4th day of December, A. D. 1871.

[SEAL.] N. C. BURCH,
Cl'k S. C.

Filed in the office of clerk of supreme court of Missouri, Dec. 2nd, 1871.

N. C. BURCH, *Cl'k S. C.*

3 The United States of America to the curators of the University of the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Bolivar S. Head is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the

said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David Wagner, presiding judge of the supreme court of the State of Missouri, this 20th day of January, in the year of our Lord one thousand eight hundred and seventy-one.

DAVID WAGNER,
Presiding Judge Sup. C't Mo.

4 I executed the within notice by leaving a true copy of the same at the usual place of abod' of Ja's S. Rollins with a white person, a member of his family, over the age of fifteen years, on the 3d day of Feb'y, 1871, in Boone County, Missouri.

JA'S C. ORR, *Sh'ff.*

Sh'ff fee, .50.

The undersigned, attorney for defendants in the within-named cause, hereby acknowledges service of the within citation, and waives the necessity of service of the same by an officer.

COLUMBIA, MO., *Jan. 25th*, 1871.

5 Know all men by these presents that we, Bolivar S. Head, John Head, and William C. Harvey, are held and firmly bound unto The Curators of the University of the State of Missouri in the full and just sum of five hundred dollars, to be paid to the said Curators of the University of the State of Missouri or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this day of , in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at the January term, 1871, of the supreme court of the State of Missouri, in a suit depending in said court between Bolivar S. Head, plaintiff, and The Curators of the University of the State of Missouri, defendant, judgment was rendered against the said plaintiff, Bolivar S. Head, and the said plaintiff, Bolivar S. Head, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Curators of the University of the State of Missouri, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such that, if the said Bolivar S. Head, plaintiff aforesaid, shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

BOLIVAR S. HEAD. [SEAL.]
JNO. HEAD. [SEAL.]
W. C. HARVEY. [SEAL.]

Sealed and delivered in presence of—
A. T. PREWITT.
LEWIS FINNELL.

Approved by—

DAVID WAGNER,
Presiding Judge Sup. C't Mo.

6 STATE OF MISSOURI,
County of Howard, ss:

On this 26th day of January, A. D. 1871, before the undersigned, a notary public within and the *the* county and State aforesaid, personally came John Head and William C. Harvey, to me personally known to be credible persons, and signed and acknowledged the within bond as securities thereto, and who, being duly sworn according to law, on oath declare that are worth at least five thousand dollars each over and above all debts and incumbrances.

JNO. HEAD.
W. C. HARVEY.

Subscribed and sworn to before me the day and date above written. Witness my hand and official seal.
[SEAL.]

J. S. REITER,
Notary Public Howard Co., Mo.

7 Be it remembered that, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy, in the office of the clerk of the supreme court of the State of Missouri, at the city of Jefferson, Missouri, the following transcript was filed:

BOLIVAR S. HEAD, PLAINTIFF,
against
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, defendants.

In the Boone circuit court, November term, 1865.

Plaintiff states that the defendants are a body corporate, duly authorized by the laws of the State to contract, sue and be sued; among other things, plaintiff states that, on the 10th day of July, 1856, at the town of Columbia, county of Boone, and State of Missouri, an agreement was made between the plaintiff and the defendants, whereby the plaintiff agreed to render his services to the defendant', as teacher or professor of mathematics from said date until the fifth day of July, 1862; in consideration whereof the defendants agreed to employ the plaintiff as such teacher or professor of mathematics during the period aforesaid, and to pay him for his services the yearly sum of thirteen hundred and fifty dollars, payable semi-annually, on the first day
8 of January and July of each year. Plaintiff states that, on or about the same time and place of the above-mentioned agreement, the plaintiff agreed to render his services to the defendants as librarian from said date until the fifth day of July, 1862; in consideration whereof the defendants agreed to employ the plaintiff as such librarian during the period aforesaid, and to pay him for his services the yearly sum of one hundred dollars, payable semi-annually, on the first days of January and July of each year.

Plaintiff states that, although he entered upon his employment, under said agreement, and duly discharged all the duties thereof until the fifth day of July, 1860; and although he has, at all times, been willing to perform all the conditions of said agreements, upon his part, the defendants refused to allow him to do so, or to pay him therefor; to the damage of this plaintiff of twenty-nine hundred dollars, and interest thereon from the time each installment became due, and for which plaintiff asks judgment.

B. S. HEAD, *Att'y.*

B. S. HEAD, plaintiff in the above-entitled cause, makes oath and says that the foregoing petition, and matters and things therein stated, are true.

9 B. S. HEAD.

Subscribed and sworn to before me, clerk of the circuit court in and for Randolph County, in the State of Missouri.

Witness my hand and official seal this 13th day of May, A. D. 1865.

[SEAL.] WILLIAM R. SAMUEL, *Clk.*

STATE OF MISSOURI,
County of Boone, sct:

The foregoing is a true copy of the petition filed in the above-entitled cause.

Witness my hand and the seal of said court hereto affixed, at office in Columbia, May 16, A. D. 1865.

[SEAL.] R. L. TODD, *Clerk.*

STATE OF MISSOURI,
County of Boone, sct:

The State of Missouri to the sheriff of Boone County, greeting:

We hereby command you to summon The Curators of the University of the State of Missouri to appear before the judge of our Boone circuit court, on the first day of the next term thereof to be held at the court-house, in the town of Columbia, within and for the county of Boone, on the third Monday in November next, A. D. 1865, to answer the petition of Bolivar S. Head, a copy whereof is hereto annexed. And have you then and there this writ.

10 Witness Robert L. Todd, clerk of said court, at office in Columbia, May 16, A. D. 1865.

[SEAL.] R. L. TODD, *Clerk.*

NOV'R 23D, 1865.

B. S. HEAD, PL'FF,
vs.
CURATORS OF UNIVERSITY.

Defendants, by their attorney, came and filed their motion to rule, plaintiff to give security for the costs of this cause.

In the Boone circuit court, Nov. term, 1865.

B. S. HEAD
vs.
CURATORS OF UNIVERSITY.

Defendants come, by their atty's, and move the court for a rule upon the plaintiff requiring him to give security for the costs which have or may accrue in the above cause, for the reason that plaintiff has no property or effects subject to execution out of which the same could be levied.

RUSSELL & GUITAR & GORDON, *Att'ys.*

NOV. 28TH, 1865.

B. S. HEAD
vs.
CURATORS OF UNIVERSITY.

This cause is continued until the next term of this court.

11 MAY 28TH, 1866.

HEAD
vs.
CURATORS OF UNIVERSITY.

This cause is continued until the next term of this court.

NOVEMBER 21ST, 1866.

B. S. HEAD
vs.
CURATORS OF UNIVERSITY.

The parties came, by their attorneys, and the motion filed to rule plaintiff to give security for the costs of this cause being heard, is overruled, and, on motion, leave is given defendant to file an answer to plaintiff's petition sixty days before the next term of this court.

In vacation. March 18th, 1867.

BOLIVAR S. HEAD, PL'F,
vs.
CURATORS OF UNIVERSITY, D'F'TS.

On this day came the defendants, by their attorneys, and filed their answer to plaintiff's petition.
March 18th, 1867.

JNO. M. SAMUEL, *Clerk.*

12 BOLIVAR S. HEAD, PLAINTIFF,
against
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, defendants.

In the circuit court of Boone County.

Defendant comes, and, by leave of court first had and obtained, for answer to the petition of plaintiff filed herein against her, denies that, on the 10th day of July, 1856, or at any other time, there was an agreement made between the plaintiff and defendant, as stated in his said petition, whereby plaintiff agreed to render his services to the defendant as teacher or professor of mathematics in said university, from the said 10th day of July, 1856, to the 5th day of July, 1862, or for any other period. Defendant denies that she made any such contract or agreement, as stated in said petition, for the consideration therein alleged to employ plaintiff as such teacher or professor during the period aforesaid or for any period of time. Defendant denies that she, at any time, made an agreement with plaintiff, as stated in said petition, whereby plaintiff agreed to render his services to the defendant, as librarian, from said 10th day of July, 1856, to the 5th day of
13 July, 1862, or for any other period. Defendant denies that she made any such contract or agreement with plaintiff, as stated in said petition, for the consideration therein named, to employ plaintiff, as such librarian, for the period aforesaid, or for any other period of time.

She denies that plaintiff has been damaged in the sum of twenty-nine hundred dollars, with interest thereon, as alleged in said petition, or any other sum.

Defendant, further answering, states that, on or about the 10th of July, 1856, plaintiff was elected or appointed by defendant to discharge the duties of the office of the teacher of mathematics in said university at and for the salary of per year, payable in semi-annual installments, and, by virtue of said election and appointment, plaintiff entered upon the duties of such office, and became a member of the faculty of said university, according to the meaning of the word faculty as used in the acts of the general assembly of this State hereinafter referred to, and, as defendant is informed, continued to discharge the duties of such office until the 4th of July, 1860, and on the day and date last aforesaid plaintiff ceased to perform the duties
14 of such office, or any other office, connected with said university, having been fully paid by defendant for all the services rendered by him in the capacity of teacher, professor, librarian, or otherwise connected with s'd university, up to the last-named day and date, and on said last-named day and date plaintiff's term of office as a member of the faculty of said university expired and determined under and by virtue of an act of the general assembly of this State, approved December 17th, 1859, entitled "An act amendatory of an act entitled 'An act to provide for the institution and support of a State university,'" approved December 4th, 1855; and also, under and by virtue of an act of the general assembly of this State, approved January 14th, 1860, entitled "An act explanatory of an act approved December 17th, 1859, entitled 'An act amendatory of an act entitled an act to provide for the institution and support of the State University,'" approved December 4th, 1855: Whereby it is provided in the first section of the amendatory act approved December 17th, 1859, to wit, "That, on the 5th day of July, 1860, the term of office of the members of the present faculty of the university shall expire and deter-
15 mine;" and it is also further provided in the explanatory act above referred to, approved January 14th, 1860, in the first section thereof, that the true intent and meaning of the act above recited is that the words "members of the present faculty of the university," as they occur in the first section of said act, shall be so construed as to embrace all professors, tutors, and teachers connected in any manner with said university. Defendant states that plaintiff, on the days of the approval of the above amendatory and explanatory acts, above referred to, was a member of the then present faculty of the university, as used and understood in said acts, and his term of office was embraced in the provisions of said statutes, which acts of the general assembly above recited, both amendatory and explanatory, defendant sets up and relies upon as a complete bar and defense to plaintiff's action.

Defendant, further answering, states that, from and after the 5th day of July, 1860, plaintiff never offered to perform any services for defendant in the capacity of teacher, professor, librarian, or otherwise, in said university; and, from and after the period last aforesaid, defendant has been informed that plaintiff has been transacting his own private business and practicing his profession.

16 Defendant, having fully answered, asks to be dismissed with her reasonable costs.

GUITAR, RUSSELL & GORDEN,
Att'ys for Def't.

MAY 21ST, 1867.

B. S. HEAD
vs.
UNIVERSITY STATE MO.

Plaintiff comes and files his motion praying the court for a rule on the defendants requiring them to elect on which of the several defenses set up in their answer they will rely for defense.

B. S. HEAD, PL'FF,
vs.
THE CURATORS OF THE UNIVERSITY OF THE State of Mo., def'ts.

Plaintiff comes and moves the court to make a rule upon defendants requiring them to elect upon which of the several defenses set up in their answer they will rely, for the reason that while the petition sets up but one cause of action, the answer contains three separate and distinct defenses, each independent of and inconsistent with the others. Several defenses are offered at the same time to the same part of the petition and the answer is bad for duplicity.

17 B. S. HEAD, *Pl'ff.*

WEDNESDAY, *May 22d*, 1867.

B. S. HEAD
vs.
UNIVERSITY STATE MO.

The plaintiff came, by his attorney, as likewise did the defendants, and the motion filed in this cause, by plaintiff, to make rule on defendants to elect defense coming on to be heard; the same is overruled.

MAY 22D, 1867.

B. S. HEAD
vs.
UNIVERSITY.

Plaintiff comes and files his demurrer to answer of defendants' filed in this cause.

(The original demurrer is missing from the papers.)

MAY 24, 1867.

B. S. HEAD, PET.,
vs.
CURATORS UNIVERSITY, DEF'TS.

The parties come, by their attorneys, and the demurrer filed herein coming on to be heard, and the court not being satisfied in the premises, the same is taken under advisement, and, by consent, the trial of the demurrer is continued until the next term of this court.

NOV. 20, 1867.

18 B. S. HEAD, PET.
vs.
CURATORS UNIVERSITY, DEF'TS.

The demurrer filed by plaintiff to strike out part of answer of defendants coming on to be heard is overruled, and leave is given plaintiff to withdraw demurrer and file his replication.

NOVEMBER 21, 1867.

B. S. HEAD, PET.,
vs.
CURATORS UNIVERSITY, DEF'TS.

Plaintiff comes and files his replication to the answer of defendants.

Replication.

B. S. HEAD, PLAINTIFF,
vs.
CURATORS OF THE UNIVERSITY OF THE STATE of Missouri, defendants.

Plaintiff, for replication to the defendant's answer, says that the acts of the general assembly, plead in bar of plaintiff's action by defendants, are invalid and of no effect, for the reason no notice was given, as required by law, of the intended suspension and alteration of the charter of the university, which, if otherwise valid, they contain.

Plaintiff, further replying, admits that he never made a formal offer to defendants to perform his part of the contract; but that defendants, by their acts and doings in appointing another person to perform
19 the same, that it was the duty of this plaintiff to perform, by installing said other person in the place of this plaintiff, and by giving such other person possession of the rooms and apparatus, without which this plaintiff could not discharge his part of the contract; and further, by sending plaintiff a printed notice that they were about to employ another person in his place, rendered such offer of performance unnecessary.

B. S. HEAD, *for Pl'ff.*

FEBRUARY 10, 1868.

B. S. HEAD, PLAINTIFF,
vs.
CURATORS UNIVERSITY, D'F'TS.

The parties came, by their attorneys, and on motion of the attorney for plaintiff, this cause is continued until the next term of this court; and it is ordered and adjudged that plaintiff pay all costs of this cause for this term, and that execution issue therefor.

MAY 25, 1868.

B. S. HEAD, PET.,
vs.
CURATORS UNIVERSITY, D'F'TS.

Plaintiff comes and files his amended replication to defendants' answer herein filed.

Amended replication.

In the Boone circuit court.

B. S. HEAD, PLAINTIFF,
against
20 THE CURATORS OF THE UNIVERSITY of the State of Missouri, defendants.

Plaintiff, by leave of court, for his amended replication to defendants' answer on the above-entitled cause, states that the acts of the general

assembly, placed in bar of plaintiff's action by defendants, were passed without any notice having been given of their intended proposal to the president and secretary of the board of curators of the university, at least one month before the session of the general assembly, at which said acts were proposed and passed.

Plaintiff states that the defendant is a private corporation, and that its funds were derived from Columbia College, the citizens of Boone County, in their private capacity, and from the Government of the United States; Columbia College and the citizens of Boone County having contributed the largest portion of the fund, and it was therefore not competent for the legislature to pass the acts, plead by defendant, so far as they affect the plaintiff.

Plaintiff, further replying, denies the allegation of defendants' answer that plaintiff never offered to perform his part of the contract, and avers that, on the 15th day of April, 1861, plaintiff duly offered
21 to perform his part of the contract, and that such offer was not accepted.

Plaintiff further states that defendants discharged him from performing his duty as teacher of mathematics and librarian in the university, and prevented him from so discharging his said duty: First, by giving plaintiff notice, on or about the first day of April, 1860, that they were about to appoint some other person to discharge his duties from and after the 4th day of July, 1860; second, by appointing such other person to perform said duties, on or about the 17th day of May, and 2nd of October, 1860; third, by installing said other person in the place of this plaintiff, on the second day of October, 1860; and, lastly, by giving said other person possession of the rooms and apparatus, without which this plaintiff could not discharge his part of the contract.

Plaintiff denies that he has been fully paid for all services actually rendered by him as librarian, teacher, and professor in the university.

B. S. HEAD, *for Pl'ff.*

MAY 26, 1868.

B. S. HEAD, PL'F,
vs.
22 CURATORS UNIVERSITY, D'F'TS.

This cause is continued until the next term of this court.

In Boone circuit court, April 13, 1869.

The cause coming on to be heard, the following evidence was submitted to the court, to wit:

1st. The act of Congress of March 6, 1820, vesting in the legislature of the State of Missouri one township of land to be appropriated to the use of a seminary of learning.

2nd. Ordinance of the convention of the State of Missouri, of 19th July, 1820, accepting said grant of land for the uses specified in said act of Congress.

3rd. Act of Mo. legislature, approved Feb. 11, 1839, entitled "An act to provide for the institution and support of a State University, and for the government of colleges and academies."

4th. Act of Mo. legislature of Feb. 8, 1839, entitled "An act to select a site for the State University."

5th. Act of Mo. legislature, approved Feb. 11, 1833, entitled "An act to incorporate the Columbia College."

6th. Act of Mo. legislature of Feb. 24, 1843, entitled "An act
23 to amend an act entitled An act to provide for the institution and support of a State University, and for the government of colleges and academies, approved Feb. 11, 1839."

7. Act of Mo. legislature approved Dec. 4, 1855, entitled An act to provide for the institution and support of the State University.

8. Act of Mo. legislature approved Dec. 17, 1859, amendatory of the act last aforesaid, and act of Mo. legislature of 14th Jan., 1860, explanatory of the act last aforesaid.

9. It is admitted (subject to exception by def't as to the relevancy of the testimony) that the president and secretary of the board of curators of the university for the time being will swear that they had no knowledge of any notice having been given to them of the contents or intended introduction and passage of the two acts plead in bar by defendants. Also, that the senator and representative from Boone in the legislature at the time had no knowledge that any such notice was given, and that the journals of the two houses of the legislature do not show any such notice, or any evidence that it was ever given.

24 10. Under the provisions of the said act of the general assembly of the State of Missouri, approved Feb'ry 8, 1839, the private citizens of Boone County, Mo., subscribed the sum of one hundred and eight thousand dollars, and Columbia College, by its board of trustees, subscribed its buildings, grounds, library, and apparatus, valued at two thousand dollars, to the building fund of said university.

In consideration of which subscriptions the university was located in Boone County some time in the year 1839. Said building and grounds subscribed by Columbia College were within two miles of the site selected for the university and were sold by the curators in 1846.

9th. On July 7, 1841, the board of curators of the university passed the following resolution: "Resolved, that the sum of 750.00 dollars be borrowed from the subscription fund until it can be refunded from the university fund, subject to the disposition of the board of Columbia College, to enable them to provide for the formation of the regular college classes, and the employment of an additional instructor."

10th. On July 9, 1856, the following resolutions were passed by the board of curators of the university:

25 "*Resolved*, That B. S. Head is hereby appointed librarian for the term of six years, commencing July 5, 1856, and ending July 5, 1862, and that his salary for services as librarian be fixed at one hundred dollars per annum, to be paid semi-annually.

"*Resolved*, That there shall be the following professorships in the faculty of arts in the University of the State of Missouri, to wit, 1 natural philosophy, astronomy & civil engineering; 2 mathematics," &c., &c., (naming the others.)

The board then proceeded to fix the salaries as follows: President, two thousand dollars and use of mansion and grounds free of charge; prof. of mathematics, thirteen hundred and fifty dollars, &c., &c., (going on to fix the others.)

The board, on motion, proceeded to elect officers of the faculty. Whereupon William W. Hudson was unanimously elected president, Bolivar S. Head was unanimously elected prof. of mathematics, &c., &c., (going on to elect balance.)

"*Resolved*, That the secretary be required to notify Messrs. Hudson, Head, (and others,) of their election to office and request their acceptance.

"*Resolved*, That the president and professors just elected shall
26 hold office for six years from 5th July, 1856, subject to law.

11. On July 10, 1856, the secretary of the board of curators of the university, in writing, notified plaintiff of his election to the professorship of mathematics, at the salary and for the period aforesaid, and request' plaintiff's acceptance. On the same day plaintiff replied to the secretary of the board of curators, and, in writing, accepted the appointment tendered, entered upon the discharge of his duties, and continued to perform the same from said date to July 5, 1860.

12. On or about the 1st of April, 1860, plaintiff was notified by circular letter, forwarded to him by defendants, that his office having been vacated by the legislature, it became their duty to fill the same, and would accordingly do so at their meeting to be held on 15th May, 1860. On 17th day of May, 1860, defendants elected a professor of mathematics in place of plaintiff for four years from July 5th, 1860, and on the 2nd of October, 1860, defendants publicly installed said prof. of mathematics in place of this plaintiff, and delivered to him pos-
27 session of the rooms and apparatus belonging to said professorship. On 2nd October, 1860, defendants appointed another person librarian in place of plaintiff, and gave him possession of the library.

13th. Plaintiff was engaged in preparing for the practice of law from 5th July, 1860 to 1st April, 1862, when he began business in that profession. The fees realized from this source from the time last aforesaid to July 5, 1852, did not more than pay the incidental expenses of the office.

Plaintiff then asked the following instructions:

1. If no notice was given to the president and secretary of the board of curators of the university of the intended proposal of the acts plead in bar by defendants at least one month next before the session of the legislature at which said acts were introduced and passed, or that no proof was made to the legislature of such notice having been given, then said acts are null and void, and constitute no defence in this action.

28 2nd. Unless the whole of the funds with which the university was founded and endowed were the exclusive property and domain of the State of Missouri, originally contributed by the State itself, and not by the United States or other parties, the institution is a private corporation, not subject to the unrestrained control of the State legislature, and the acts plead in bar by defendants are null and void, as being in conflict with article one, sec. 10, of the Constitution of the United States, and of article thirteen, section seventeen, of the constitution of the State of Missouri, then in force, and said acts cannot, therefore, avail defendants as a defence to this action.

3rd. Although the university may be a public corporation, the offices held by plaintiff are, nevertheless, not public offices, but mere ministerial offices, which plaintiff held as a servant for hire. He had a vested right in the franchises of those offices from the moment he accepted them, which right could not, consistently with the Constitution of the United States and of this State, be impaired by the legislature in the acts plead in bar by defendants.

4th. The acts plead in bar by defendants, so far as they relate
29 to the faculty of the university, do not constitute a law, but a mere judicial sentence, and said acts, as to such parts, are null and void, being violative of the second article of the constitution of this State, then in force.

5th. If the defendants, on the 9th day of July, 1856, elected plaintiff professor of mathematics and librarian in the university, and fixed his

salaries at thirteen hundred and fifty and one hundred dollars per annum, respectively, and if defendants, by resolutions duly passed, fixed the tenu'e of plaintiff's offices at six years from July 5, 1856, and, through their secretary, notified plaintiff of his said election, stating the amount of salary and the length of time for which he was elected, and requested his acceptance, and plaintiff did so accept, then such election, resolutions, and notification, and acceptance constitute a valid and binding contract in law, which the legislature could not impair, and plaintiff is entitled to recover if he was dismissed by defendants without any fault on his part.

6. The acts plead in bar by defendants, so far as they relate to the faculty of the university and to this plaintiff, constitute an exercise of corporate powers by the legislature, which powers are confided, by the charter of the institution, to the board of curators, and to no other body; and the legislature is not authorized, by the constitution of the State or by law, to assume these corporate functions and alter the tenure for which plaintiff had been appointed to serve, after it had been fixed by the curators and accepted by plaintiff.

7. Although the plaintiff may have held a public office, if the legislature, either directly or through the agency of the board of curators of the university, elected plaintiff prof. of math. and librarian in the university, at the stipulated salaries of $1,350 and $100 per annum, respectively, for his services during a period limited to six years from July 5, 1856, this, during said period of six years, is just as much a contract, within the purview of the constitutional prohibition contained in the constitutions of this State and of the United States, as a like contract would be between two private individuals; and the acts plead in bar cannot have the effect of removing plaintiff from office, as they contain no provision whatever respecting the office itself, either abolishing it or changing its tenure, mode of appointment, or any provision which would require plaintiff to give up his office, in order that the law might take effect.

All of which instructions being objected to, and refused by the court, the court then proceeded to render judgment as follows, viz:

TUESDAY, *April* 13, 1869.

B. S. HEAD, PL'F,
vs.
CURATORS UNIVERSITY, D'F'TS.

Now, upon this day come the parties, by their attorneys, and neither party requiring a jury, the issue herein joined is submitted to the court by oral consent in court, entered upon the minutes, and the court doth find the issue for the defendants, and doth order and adjudge that defendants recover of plaintiff all costs of this cause and that execution issue therefor.

TUESDAY, *April* 13, 1869.

BOLIVAR S. HEAD, PET.,
vs.
CURATORS UNIVERSITY, D'F'T.

Now, upon this day comes the plaintiff and files his motion for a new trial, and in arrest of judgment, which is overruled, and plaintiff files his affidavit for an appeal to the fourth district court of the State of

Missouri, and tenders his bill of exceptions, praying that they be signed, sealed and made a part of the record, which is done accordingly, and the appeal granted.

Motion for a new trial.

In the Boone circuit court.

BOLIVAR S. HEAD, PL'FF,
vs.
CURATORS OF THE UNIVERSITY OF THE STATE of Missouri, defendants.

Now comes the plaintiff, and moves the court to set aside the judgment in the above entitled cause, and grant a new trial for the following reasons, to wit:

1st. The court refused to give proper instructions asked by plaintiff.
2d. The court gave improper instructions asked by defendants.
33 3. The finding of the court is against the law and the evidence.

B. S. HEAD.

Affidavit for appeal.

In the Boone circuit court.

B. S. HEAD, PL'FF,
vs.
THE CURATORS OF THE UNIVERSITY OF THE State of Mo., defendants. } Affidavit for appeal.

Plaintiff on oath declares that his application for an appeal in the above-entitled cause is not made for vexation and delay, but because this affiant believes that the appellant is aggrieved by the judgment of the court.

B. S. HEAD.

Sworn to before me, clerk of the Boone circuit court. Witness my hand and seal of said court hereto affixed at office in Columbia, April 13, 1869.

[SEAL.] JNO. M. SAMUEL, *Clerk.*
By W. N. GARTH, *D. C.*

STATE OF MISSOURI,
County of Boone, sct:

I, Jno. M. Samuel, clerk of the circuit court within and for the county and State aforesaid, do hereby certify the above and foregoing
34 to be a full, true and perfect copy of the record in the cause of Bolivar S. Head, against The Curators of the University of the State of Missouri, as the same now appears from records and original papers now on file in my said office.

In testimony whereof I hereto set my hand and aff'x the seal of said court at office in Columbia, July 10, 1869.

[SEAL.] JNO. M. SAMUEL, *Clerk.*

Costs: Jno. M. Samuel, clerk, $25.65; R. L. Todd, clerk, 7.40; J. F. Baker, sh'ff, 1.50; Ja's C. Orr, sh'ff, 1,10—$35.65.

A true bill of costs. Witness.

JNO. M. SAMUEL, *Clerk.*

(Endorsed by clerk of District court:) Filed July 12th, 1869. W. C. Barr, cl'k.

Be it remembered that, at that January term, 1870, of the 4th district court of Missouri, and on the 18th day of said month of January, the following among other proceedings were had, to wit:

B. S. HEAD, APPELLANT,
vs.
35 CURATORS OF STATE UNIVERSITY, RESPONDENT.

Now come the parties, by attorney, and appellant files assignment of errors, statement of case, and brief of authorities relied upon, and respondent files joinder in error, statement and brief, and the cause is submitted to the court without argument.

Whereupon the court, having fully considered the law and evidence adduced as applicable to the issues herein, finds that the judgment of the Boone circuit court is in accordance with the law and the evidence before said court.

Whereupon it is ordered and adjudged that said judgment of said lower court be, and the same is, in all things affirmed.

Afterwards, to wit, on the 19th day of January, 1870, and during the January term of the said 4th district court, the following further proceedings were had in said cause, to wit:

B. S. HEAD, APPELLANT,
vs.
CURATORS OF STATE UNIVERSITY, RESP'T.

Now comes the appellant, and files his affidavit for an appeal
36 in this cause, which is seen by the court, and said appeal allowed.

And the clerk of this court is ordered to make a full and complete transcript of the record and proceedings in this cause, authenticated by the seal of this court, and forward the same to the clerk of the supreme court, at Jefferson City, Missouri.

Afterwards, to wit, on the 6th day of April, 1870, there was filed with the clerk of this court the written opinion of the court in this cause, which said opinion is in the words and figures following, to wit:

BOLIVAR S. HEAD, APPELLANT,
against
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, respondent.

Appeal from Boone County circuit court.

WILSON, *Judge*, delivered the opinion of the court:

This action was brought to the November term, 1865, of the circuit court of Boone County. The plaintiff alleges in his petition that he entered into an agreement with the defendants on the 10th day of July,
1856, by which he was employed as professor of mathematics in
37 the University of the State of Missouri, from that day until the 5th day of July, 1862, for which, by said contract, he was to receive a salary of 1,350$, payable semi-annually; that, about the same

date, he was employed to serve as librarian for the defendants until the 5th day of July, 1862, for which they agreed to pay him 100$, payable semi-annually; that he faithfully performed the duties of teacher of mathematics and librarian until the 5th day of July, 1860, when he was discharged, although he was ready and willing to continue to discharge the duties of the respective positions until the expiration of his term of employment. He asks judgment for the sum of 2,900$, and interest thereon from the time each semi-annual instalment became due.

The defendants' answer denies there was any contract or agreement between the plaintiff and them by which they agreed to employ him as professor of mathematics or librarian, as stated in his petition; but, about the 10th day of July, 1856, plaintiff was elected or appointed to discharge the duties of the office of teacher of mathematics in
38 said university, at the salary stated; that, by virtue of said election, the plaintiff entered upon the discharge of the duties of said office, and thereby became and was a member of the faculty of said university, and so continued to act until the 4th day of July, 1860, when his term of office as a member of the faculty and professor in the university expired by virtue of an act of the general assembly of the State of Missouri, approved December 17th, 1859, and an act explanatory thereof, approved the 14th day of January, 1860, and pleads said acts in bar of the plaintiff's right to recover.

The plaintiff, in his replication, denies the defendants' right to plead said acts of the legislature in bar to his action, and for reason therefore say the University of the State of Missouri is a private corporation, its funds having been derived from the United States, from Columbia College, and the citizens of Boone County; that a notice of an intention to pass said acts was not given the president and secretary of the board of curators of the university one month before said acts were passed.
39 The trial was by the court, neither party requiring a jury. The judgment was for the defendants. The plaintiff, upon the overruling of his motion for a new trial, brings the cause here by appeal.

If the University of the State of Missouri is a private corporation, the plaintiff might with propriety insist on the correctness of his position; if, on the other hand, however, it is a public corporation, then the legislature of the State as the trustee of the public interest has exclusive and unrestrained control of it, may modify or destroy it as the public good may require. Such institutions cannot have the least pretensions to sustain their privileges or existence upon anything like a contract between them and the State legislature. (See Angell and Ames on Corporations, Sec. 31.) Now, if the university of which the defendants are curators is of the latter character, then the plea in bar was properly allowed.

For the purpose of determining the class of corporations under which the State University falls, it only becomes necessary to briefly ex-
40 amine the manner of its organization, its means of support, and by whom the benefits of the institution are received.

In 1820, the Government of the United States made a grant of land for the purpose of enabling the State to establish and support an institution of learning. The title to the grant was vested in the legislature of the State to be by it applied solely to the use of a seminary of learning. The legislature complied with the conditions of the act of Congress making the donation and established the University of the State of Missouri.

The university is supported from the interest on its endowment fund

and from the tuition fees of its patrons, and from appropriations of the State legislature. It is true that the citizens of Boone County and Columbia College did make a contribution of money and property, but it is not understood that such contribution was to establish or found the university; but was designed as a bonus offered to induce the legislature to locate the university in Boone County; none of its funds are derived from private citizens or other corporations as stock-
41 holders. There are no dividends made, the management of its funds are entrusted to the board of curators, or directly controlled by the legislature. The powers conferred upon the board of curators were granted exclusively for the use of the public, and not for the benefit of private citizens. The State owns the entire university, and has exercised absolute control over it ever since its incorporation. The legislature elects the board of curators, and increases or diminishes the number at will. By the act of March 3d, 1845, the number was twenty, which was changed by the act of the 10th of March, 1849, to eighteen. By the act of 1845, the governor, the secretary of state, the auditor of public accounts, the State treasurer, and the president of the university were curators by virtue of their respective offices.

By the act of 1849, that portion of the law of 1845 was so changed as to make the entire board elective by the State legislature. By the act of the 4th of December, 1855, the entire board of curators was legislated out of office, and a new one elected and the length of
42 time they should serve fixed. There is no pretension that the university was founded by private citizens with their individual funds, or that private citizens receive any of the benefits or emoluments arising from the institution not common to every citizen of the State.

The supreme court of North Carolina, in a case much like the one under consideration, held the University of North Carolina to be a public corporation. The University of Alabama was held to be a public corporation by the supreme court of that State, for the reason that the State had the control of the institution, and under no obligation to contract with any private persons. All the authorities are in harmony, and the conclusion is irresistable that the University of the State of Missouri is a public corporation, and therefore subject to the unrestrained control of the State legislature. The power and authority of the legislature to abolish or change the term of the office held by the plaintiff appears to have been understood by the curators at the time of his election, as we conclude from a resolution passed on the day of
43 the election of the faculty, to wit, on the 10th day of July, 1856, which reads as follows: "Resolved, that the president and professors just elected shall hold their offices for six years from the 5th day of July, 1856, subject to law."

There is no legislative body that could enact laws but the legislature of the State, and the expression "subject to law" must mean subject to whatever law the State legislature might see proper to pass.

The failure to give the president and secretary of the board of curators notice of the proposed action of the legislature, cannot, in this case, have the effect of rendering the acts of 1859 and 1860 void. If applicable at all, it is merely directory.

The relation between the plaintiff and the defendants did not result from any contract or agreement between the parties, but from the law establishing the university, creating the office of professor of mathematics therein, and providing the manner of filling it, and which the legislature could change at will.

We cannot see that the plaintiff has any just cause to complain of the ruling of the circuit court.

44 The other judges concurring, the judgment is affirmed.

E. V. WILSON.

STATE OF MISSOURI,
County of Macon, ss:

I, Jno. M. London, clerk of the 4th district court of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in said court, in the above-entitled cause, together with a true copy of the opinion of the court herein.

Witness my hand and official seal. Done at office, in Macon, Mo., this the 25th day of April, A. D. 1870.

[SEAL.] JNO. M. LONDON, *Clerk.*
Per W. MORRIS, *D. C.*

Costs in district court.

To London, cl'k, dock. fee p'd by app't.....	$10
" , &c., copy of opinion, ju'gm't, &c	5 95

Above transcripts filed June 18, 1870, in office clerk supreme court.

45 Be it remembered that, at a supreme court of the State of Missouri, begun and held at the city of Jefferson on the first Monday in July, it being the 4th day of the month in the year one thousand eight hundred and seventy, among other the following proceedings were had.

Seventh day, Monday, July 11th, 1870.

B. S. HEAD, APP.,
vs.
THE CURATORS OF THE STATE UNIVERSITY,
respondents.

Assignment and joinder of errors filed, which said assignment and joinder are in the following words and figures:

B. S. HEAD, APPELLANT,
vs.
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, respondents.

Assignment of errors.

Appellant insists that the dist. court erred in affirming the judgment of the circuit court.

B. S. HEAD,
Attorney for Appellant.

Respondent comes and says there is no error in the record, and insists that the judgment be affirmed.

GUITAR & PREVITT.

46 Eighth day, Tuesday, July 12th, 1870.

B. S. HEAD, APPELLANT,
vs.
THE CURATORS OF THE STATE UNIVERSITY, respondent.

Now, at this day, come the parties aforesaid, by their respective attorneys, and submit this cause to the court for final decision upon their written arguments.

MONDAY, *July 18th*, 1870.

Ordered by the court that the following causes be taken under advisement.

* * * * * * * * * * *

B. S. HEAD, APPELLANT,
vs.
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, respondent.

* * * * * * *

And be it remembered that, at a supreme court of the State of Missouri, begun and held at the city of Jefferson, on the second Monday in January, in the year one thousand eight hundred and seventy-one, it being the ninth day of the month, among other the following proceedings were had:

47 BOLIVAR S. HEAD, APPELLANT,
vs.
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, respondents. } Appeal from 4th district.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and a'judge that the judgment aforesaid, in form aforesaid, by the said fourth district court rendered, be, in all things, affirmed, and stand in full force and effect.

And it is further considered and adjudged by the court, that the judgment aforesaid, in form aforesaid, by the said circuit court of Boone County rendered, be, in all things, affirmed, and stand in full force and effect. And it is further considered and adjudged by the court, that the said respondents recover against the said appellant their costs and charges herein expended, and have therefor execution.

Opinion filed.

Which said opinion is in words and figures following, to wit:

48 In the Supreme Court. January term, 1871.

B. S. HEAD, AP'T,
v.
THE CURATORS OF THE UNIVERSITY OF THE State of Missouri, resp. } Appeal from fourth dist. c't.

Opinion of the court.

In July, 1856, the curators of the University of the State of Missouri "elected" the pl'f to the professorship of mathematics in that in-

stitution. The election was for a term of six years, "subject to law." The salary attached to the professorship was $1,350 per annum. The pl'f was also appointed librarian for a like term of six years, with an annual salary of $100. The term of office, in such case, commenced on the fifth day of July, 1856. The pl'f accepted the appointments and discharged the duties of the respective positions for four years, and was paid for his services.

On the 17th of December, 1859, the legislature passed an act vacating the offices of all the "professors, tutors, and teachers connected,
49 in any manner, with the university," that is, it was enacted that the term of office of the parties named respectively should expire on the fifth day of July, 1860. It was also enacted that the board of curators should go out of office upon the election of their successors, according to the provisions of the same act. (Acts 1859–60, 91.) See also the explanatory act of January 14, 1860. (Acts 1859–60, 92.)

The pl'f rendered no service after the fourth of July, 1860. He avers, however, that he held himself in readiness to do so to the conclusion of his original term of office, that is, to July 5, 1862. This suit is brought to recover the salaries attached to the respective offices for two years, namely, from July 5, 1860, to July 5, 1862. In bar of the suit the defendants plead the acts of December 17, 1859, and January 14, 1860.

The only question which it is necessary to consider relate to the constitutional validity of these acts. The plaintiff denies the right of the legislature to control the university, and insists that the acts in
50 question are in conflict with that provision of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts.

Whether the university and its affairs are subject to the direction and control of the legislature depends upon its character as a corporation, whether public or private. If it is a private corporation the legislature has no control over its internal management. On the other hand, if it is a public corporation—a State institution—it is subject to the discretionary control of the law-making department of the State government.

The university is clearly a public institution, and not a private corporation. It was established by an act of the legislature which was passed February 11, 1839. (Acts 1838–9, p. 176.) The act commits the government of the institution to a board of fifteen curators. The curators were not named in the act, but provision was made for their election by a joint vote of the Senate and House of Representa-
51 tives. They were removable at the pleasure of the legislature, and had no power to appoint their successors. (Acts 1838–9, 176, §§ 1, 2, 3.)

There are no named grantees in the act, and consequently no parties either to accept or reject the grant. In a word, the State entered into no compact with private parties. The State established an institution of its own, and provided for its control and government through its own agents and appointees. The act creating the institution in its first section declares: That a "University is hereby instituted in this State, the government whereof shall be vested in a board of curators." The university is then (§ 2) declared "corporation and body politic," and invested with certain powers. These powers are given into the hands of a board, which was made subject to the pleasure of the legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights

52 were concerned in the institution of the University of the State of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for education purposes; a State university. (Angell & Ames Corp., § § 31–36; 5 Stewart & Porter, (Ala.,) 17; University of North Carolina v. Maultsby, 8 Iredell, 257; Bush v. Shipman, 4 Scam, 190.)

The legislature, by an act passed February 8, 1839, (act 1838–9, 184,) appointed a board of commissioners to locate the university and receive grants of land, as also bids from certain named "counties and from the citizens thereof, for such sums of money" as might be offered to secure the location of the institution.

Under this act, as the case shows, "private citizens of Boone County subscribed the sum of $108,000; and Columbia College, by its board of trustees, subscribed its buildings and apparatus, valued at $10,000,
53 to the building-fund of said university." It further appears that the university was located in Boone County, in consideration," &c., of the above-mentioned subscriptions. In other words, the parties named contributed a liberal bonus to secure the location of an existing State institution in their county; but these contributions to the building-fund did not constitute the contributors founders of the university. Nor did the contributions alter the "nature of the foundation, or change the character of the corporation." (University of N. C. v. Maultsby, ubi supra.) Between this and the Dartmouth College case, and the cases following that decision, there is a broad distinction, namely, the difference that exists between a public institution of the State and a private corporation.

The statute (R. S., 1855, 1502, § 24) under which the plaintiff held in the university the office of professor of mathematics, made provision for the "offices" of president, professors, and tutors, and the mode of filling them. It then declares all these offices vacant on the fourth day of July, 1856. The defendant was subsequently elected to fill one
54 of the "offices" thus made vacant by legislative enactment, his term of office commencing on the fifth day of July, 1856, as we have seen. The plaintiff acceded to the office in virtue of an election, and not in virtue of a contract of hiring entered into betweeu him and the university. He was an officer of the institution, and not a mere employee. He was elected, and for a term of six years, "subject to law." Whether those terms—subject to law—referred to then existing laws, or to such laws as the legislature might thereafter enact, it is not important to enquire. The pl'f was subject to both classes of laws as regarded the length of his official term. He held an office in a public corporation, and it was competent for the legislature to extend or shorten the term, or, if it should see cause, abolish the office altogether. That is the current doctrine on this subject. In Connor v. The City of New York the court say, "When an office is created by statute it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the
55 latter may be taken away without abolishing the office. * * * Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its inte'-ferance." (2 Sandf., 369.) Again, it is said in Smith v. The Mayor, (37 New York, 520:) "An office is simply an appointment or authority on the part of the government to perform certain duties, usually at and for a certain compensation. Both the office itself and the compensation, upon general principles of law, are entirely within the control of the

government to diminish, increase, or abolish. So it may at any time be given up by the incumbent."

The plaintiff in the case at bar was not bound by contract to serve in the position of professor of mathematics for the full term of six years. He was at liberty to resign at any time and abandon the office altogether. He had the legal right to do so, and the State had the constitutional authority to change the duration of the term and limit it to four
56 years, as it in fact did do. (See Prim v. City of Carondelet, 23 Mo., 24.)

As regards the office of librarian, it may be further remarked that the plaintiff held that position merely at the pleasure of the board of curators. The statute under which the pl'f held that office so declares. (R. S. 1855, 1500, §§ 10 & 27.)

The judgment will be affirmed.

Judge Wagner concurs. Judge Bliss not sitting.

(S'g'd) WARREN CURRIER.

STATE OF MISSOURI, *sct:*

I, N. C. Burch, clerk of the supreme court of the State of Missouri, at Jefferson City, Mo., certify that the foregoing is a full, true, and complete transcript of the record filed and proceedings had in the above-entitled cause in the supreme court aforesaid, as fully as the same appears of file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, this fourth day of December, A. D. 1871.

[SEAL.] N. C. BURCH, *Clerk.*

(Indorsement on cover:) No. 442. Boliver S. Head, plaintiff in error, vs. The Curators of the University of the State of Missouri. Missouri sup. c't. Filed 28th October, 1872.

REC. 442—3

Supreme Court of the United States,

No. 225.

BOLIVAR S. HEAD,
Plaintiff in Error,

vs.

THE CURATORS OF THE UNIVERSITY OF THE STATE OF MISSOURI,
Defendants in Error.

Brief Under the 21st Rule for the Plaintiff.

B. S. HEAD,
Pro Se.

Moberly Enterprise-Monitor Printers.

Supreme Court of the United States,

No. 1225.

BOLIVAR S. HEAD,
Plaintiff in Error,

vs.

THE CURATORS OF THE UNIVERSITY OF THE STATE OF MISSOURI,
Defendants in Error.

Brief Under the 21st Rule for the Plaintiff.

H. S. HEAD,
Pro Se.

SUPREME COURT UNITED STATES.

B. S. HEAD vs. THE CURATORS OF MISSOURI UNIVERSITY.

PLAINTIFF'S BRIEF.

Abstract of Case.

The University of the State of Missouri was founded in the year 1839 on funds contributed as follows:

1st, One entire township of land granted by the United States and vested in the Legislature of Missouri, "TO BE APPROPRIATED SOLELY TO THE USE OF SUCH SEMINARY BY THE SAID LEGISLATURE."

2nd, One hundred and eight thousand dollars contributed by private citizens upon condition that said institution should be located in the County of Boone, and upon the further condition that the funds so contributed were to be "SECURED TO THE STATE FOR THE USE AND BENEFIT OF SAID UNIVERSITY."

3d, The lands, buildings, library and apparatus of Columbia College (itself a private corporation) valued at ten thousand dollars, granted by the trustees of said Columbia College upon the conditions, expressed in the act of the Legislature under which the grant was made, that said University should be located in the County of Boone, that said College as a corporation should not be dissolved but should be deemed a College of the University, subject to regulation and government as such, and that the property so granted should be "vested in the State for the use specified in the grant." (See evidence in this case and ses. Acts. of Missouri, 1839.)

The State of Missouri up to the time of the institution of this suit had contributed no funds whatever towards the foundation and support of the University.

By the terms of its charter the government of the University was vested in a Board of Curators who were empowered to appoint a President of the University, but the appointment of the Faculty was left to the Trustees of the Colleges and Academies.

The members of the Faculty held their offices during the pleasure of the Board of Trustees, "UNLESS EMPLOYED UNDER A SPECIAL CONTRACT," and these thus employed were not removable unless after NOTICE, A HEARING AND A TRIAL.

Thus organized with Columbia College as its only college, the University continued in operation until 1842, when the Legislature of Missouri abolished the Board of Trustees of Columbia College and vested their powers and duties in the Curates.

Columbia College and the University thus completely merged into one institution continued without material changes in their organic law until the year 1855, when the chairs of President and Faculty were vacated by act of the Legislature, which at the same time empowered the Curators to fix the term of the President and Faculty, not to exceed six years for any one term, with authority to remove any one of them from office "for incompetency, willful neglect or refusal to discharge the duties of his office, and FOR NO OTHER CAUSE."

But no such removal could be made until the accused should "HAVE HAD TEN DAYS WRITTEN NOTICE OF THE PROPOSED CAUSE OF REMOVAL, AND REASONABLE TIME TO ANSWER THE SAME, BEFORE THE BOARD, BY THE INTRODUCTION OF TESTIMONY OR OTHERWISE."

This was the state of the law, when on the 9th day July, 1856, Defendants by resolutions appointed Plaintiff Professor of Mathematics and Librarian in the University, for six years, ending July 5th, 1862, subject to law, fixed his salary at $1,350 and $100 per annum respectively, and required their Secretary to notify him of his appointment and to request his acceptance. On the 10th day of July, 1856, Plaintiff was accordingly notified, filed his acceptance in writing, and entered upon his duties, which he continued to discharge in both capacities until July 5th, 1860.

In May, 1860, Defendants, after public notice, appointed a Professor of Mathematics to succeed Plaintiff, and installed him on the 2d of October following, delivering to him the rooms and appurtenances of the professorship. At the same time they appointed a new Librarian and ousted the Plaintiff.

These amotions of Plaintiff without any trial or hearing, as provided both in the original and in the amended charter of the University, Plaintiff resisted as tyrannical and oppressive, and brought suit against Defendants as for a breach of contract, in the Circuit Court of Boone County, Mo., claiming damages in the sum of $2,900 with interest, the principal being the salary for the two years of his term that had not expired at the time of his ejectment. The only defense made to this action is a plea in bar, setting up an Act of the Legislature of Missouri, approved December 17th, 1859, declaring that, "ON THE 5th DAY OF JULY, 1860, THE TERM OF OFFICE OF THE MEMBERS OF THE PRESENT FACULTY OF THE UNIVERSITY SHALL EXPIRE AND DETERMINE." (See Session Acts of Missouri, 1859, p. 91).

At the trial of the case by the Court setting as a jury, Plaintiff asked six instructions, all of which were overruled. To the ruling of the Court in refusing Plaintiff's instructions he excepted and carried the case by appeal to the Fourth District Court of the State of Missouri, where the decree of the Circuit Court was affirmed, and the action of said District Court being affirmed by the Supreme Court of the State of Missouri on appeal, the case is brought here for final adjudication.

ERRORS.

The Plaintiff in Error says that in the Record and in the giving of the judgment aforesaid there is manifest error.

1st. In this: That said Supreme Court affirmed the action of the Courts below in refusing to grant the prayer of Plaintiff's petition.

2d. In this: That said Court affirmed the action of the Courts below in refusing the instructions asked by the appellant.

POINTS AND AUTHORITIES.

POINT 1. Although the University may be a public corporation, the professors employed therein are nevertheless not public officers. They are mere servants for hire. They are not required to take any oath of office or to be citizens of the

State or the United States. Contracts for their services, like those of artisans and mechanics, should be securely guarded by the courts, and all enactments liberally construed in their favor, inasmuch as their employment is so important to the public and to the State. Like the city engineer of a municipal corporation, a civil engineer and traveling agent, or any other employee at a fixed salary for a specified period, their engagements, whether by resolutions of the Boards of Trustees or otherwise, or whether they are employed in public or private institutions of learning, should be held as being under the protection of the prohibitory clause contained in the Constitution of the United States, and not subject to impairment by a mere legislative enactment. Particularly so when such enactment is no law but a mere sentence of ouster, as is clearly the case with that section of the act plead in bar to this suit. D. College vs. Woodward 4th Wheaton 653, Marshall's opinion; Webster's argument in the same case; Louisville vs. Louisville University, 15th B. Monroe 728, Heiss' opinion; 7th Gray (Mass. 33; Williams vs. Wadsworth 49th Barb; Allen vs. McKean 1 Sumner, 314; St. John's College vs. the State, 15 Md. 373-4.

POINT 2. Although the professors of the University may be public officers, they have a vested right and legal property in their offices and the salaries attached thereto, of which they cannot be divested except by due process of law, which means the judgment of a judicial tribunal of competent jurisdiction. The only tribunal established by law for the removal of a member of the faculty of the University is that provided for in the 24th and 25th sections of the 2d Article of the charter of that institution (R. S. Mo, 1855, Vol. 2, P. 1,502) where he is accorded a hearing, a trial and the usual appliances of a defense. Instead of this, special pains were taken to deprive Plaintiff of notice by the ex parte proceeding of introducing, passing and approving the act plead in the bar all on the same day as shown by the date of the act and the legislative journals. In this the legislature acted outside of its legitimate sphere as a law-making power, assumed judicial functions and passed a mere sentence of ouster against the Plaintiff, which Defendants enforced without further trial or hearing. Allen vs. McKean 1 Sumner 313-314; Constitution of Missouri., 1856, Article 2; 1 Stark Ev. 217; 7 Ohio 82; Fletcher vs. Peck, 6 Cranch 87; State vs. Fry 4 Missouri, 187; id 194; 44 Missouri 570; 2 Black, 156 (1 Black 435); 4 Kent Com. 127; 2 Id. 294 (306); 1 Burr 517; 2 Bin 441; 4 Bin. 448; 5 Bin. 486; A. and Ames Corps. 237; Baker vs. People 3 cow 686.

POINT 3. There is a limit to legislative power even over public corporations. Dartmouth College vs. Woodward; 4 Wheaton 694-5 and authorities there cited; Kent's Com. 274 300; A & Ames Cop. 27 8; Turret vs. Taylor 9 Cranch 52; Louisville vs. Louisville University 15 B. Monroe 673-4.

POINT 4. "When the Legislature makes a contract with a public officer, as in the case of a stipulated salary for his services during a limited period, this, during the limited period is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens." (Story's opinion in Dartmouth College vs. Woodward 4 Wheaton 694) It is to be admitted, however, that such a contract is subject to the legislative power to abolish the office or to enact any law respecting the tenure, mode of appointment and even requiring new qualifications for the incumbent. When such a law is passed it is usually required that the incumbent must give up his office in order that the law may take effect, and this on the ground of public policy. But until such a law is passed he is protected by the United States Constitution and the Legislature cannot remove him without power reserved for that purpose. No power is reserved in the organic law of the University or in any general statute, for the Legislature to remove a member of its Faculty of Arts from office. Now if we examine the act plead on bar to this suit we find that it does not abolish the office, alter its tenure, or mode of election or appointment, or establish any rule or law whatever respecting it. Neither does it re-

quire any new or different qualifications for the incumbent. It simply undertakes to nullify and undo the action of the Board of Curators in fixing the term of the (then) present Faculty at six years. It does not undertake to alter or limit the authority of the curators to appoint for six years. It aims alone at that particular term, already fixed by competent authority, and only at these particular incumbents, the (then) present Faculty. If the provisions had been added that the Curators should not thereafter appoint the Faculty of Arts for a longer period than four years, this might have brought the case within the doctrine of the authorities relied on by the Defendants, provided the Faculty may be regarded as public officers and the University a public corporation.

Marbury vs. Madison, 1 Crauch; Allen vs. McKean, 1 Sumner, 314; State vs. Fry, 4th Mo., 184, 187 and 194: Green vs. Biddle, 8 Wheaton, 1; Story's opinion in 4th Wheaton, 694; 7 Johns, 477.

POINT 5. The University is, however, a private corporation. A corporation is private, as distinguished from public, unless the whole interest belongs to the Government "which could or did create the corporation," or the corporation is created for the administration of political or municipal power. The evidence in this case shows that the funds for the foundation and support of the University were in no part contributed by the State. Those contributed by the United States were received by the State as trustee for the University thereafter to be created. The ten thousand dollars contributed by Columbia College, a private corporation, (2 Ter. Laws of Missouri, 375), including its grounds on which the main edifice of the University is built, were VESTED IN THE STATE FOR THE USES SPECIFIED IN THE GRANT." [See Acts Mo., 1839, p. 186, Sec. 15). There were further conditions, also, that said College should become a college of the University and should not thereby lose its corporate existence. The $108,000 contributed by private citizens were given upon condition that the University should be located in their county, and upon the further condition that said funds were "TO BE SECURED TO THE STATE FOR THE USE AND BENEFIT OF THE UNIVERSITY."

The State, therefore, is a mere trustee of the funds so contributed, and bound to a faithful application of them to the objects for which they were donated. It is simply absurd to say that the Legislature could either abolish the University or remove it from Boone county.

Sess. Laws Mo. 1839; Art. 1, p. 174; id. 178, Sec. 27; id. 180, Sec. 7; id. 184, Sec. 9; id. 185, Secs. 4, 6; id. 186, Secs. 13, 14 and 15; Wallace, jr. 275; 7 Gill & Johns. 7; Edwards vs. Jagers, 19 Ind. 407; Allen vs. McKean, 1 Sumner, 302; Dartmouth College vs. Woodward, 4 Wheaton, 518; Lousville vs. Louisville University, 671-4.

POINT 6 The Supeme Court of the State of Missouri says, in its opinion, that the State in founding the University, "entered into no compact with private parties." Previous to chartering the University, the Legislature passed an act to select a site for the State University, in which act the Commissioners named in it were authorized to receive "bids from the counties and from the citizens thereof, for such sums of money as may be secured to the State for the USE AND BENEFIT of the University." Said act also provided that if any land and buildings "shall have been granted by the Trustees of an incorporated college the corporation shall not be dissolved."

Now the evidence shows that private citizens under said act offered $108,000 and Columbia College, a private corporation, its grounds and buildings valued at $10 000 both of which offers were accepted by the Commissioners and were actually used in founding the University. If this does not present a case of compact with private parties it would be difficult to find one that does.

Sess. Laws Mo. 1839, pp. 185-186, Secs. 6, 13, 14 and 15, and authorities before cited.

POINT 7. The Supreme Court of the State of Missouri says, in its opinion, that the Legislature "could abolish the office altogether." If the Professorship of Mathe-

matics were abolished, the University would cease to be a University, and such an act would be a deviation from duty on the part of the State as trustee of the funds granted by the United States as well as those donated by the private parties before mentioned. The Professorship of Mathematics was established by the Curators, in whom was vested the visatorial power, and not by the Legislature.

POINT 8. The Supreme Court of the State of Missouri says that Plaintiff could have resigned at any time and abandoned his office altogether, and seeks to draw the inference that the Curators or Legislature were in no way bound to Plaintiff, for the reason that there was a lack of mutuality of obligation. This theory carried out in its legitimate analogies would overturn the well established doctrine of the Supreme Court of the United States, that a State or the Government can not revoke a grant of land to private parties, although such grant be made without a valuable consideration, and although the grantee is at liberty to abandon the land at any time.

B. S. HEAD, Pro. Se.